Appeal No. 03-1160

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SIERRA CLUB
Appellee

v.

CITY OF LITTLE ROCK
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION
Honorable James M. Moody, Judge
No. 4:00CV022JMM

APPELLANT'S BRIEF

Honorable Thomas M. Carpenter, Ark. Bar 77024
Little Rock City Attorney
Beth Blevins Carpenter, Ark. Bar 91218
Deputy City Attorney
City Hall - Suite 310
500 West Markham Street
Little Rock, Arkansas 72201
Telephone: (501)-371-4527
Counsel for Appellant

SUMMARY AND REQUEST FOR ORAL ARGUMENT

The District Court found the Little Rock Sanitary Sewer Committee ("LRSSC") liable for violating the Clean Water Act regarding sanitary sewer overflows ("SSOs") and approved a Settlement Agreement between LRSSC and the Sierra Club. The Settlement Agreement addressed the Sierra Club's issues regarding SSOs. The Sierra Club was awarded all of its requested attorneys' fees against LRSSC. The District Court found that the City of Little Rock was technically in violation of its NPDES Permit because SSOs had entered the City's storm water system. The District Court declined to issue an injunction, civil penalties or any other relief against the City because there was no evidence in the record indicating that the City would not continue to cooperate with LRSSC, the entity responsible for addressing and correcting the SSOs. The Sierra Club requested attorneys' fees against the City. The District Court erred in awarding attorneys' fees against the City because the Sierra Club was not the prevailing party or substantially prevailing party as to the City. After a bench trial the District Court concluded that the City had always utilized a comprehensive master planning process for new development and entered Judgment in the City's favor. The City requested its expert witness fees as the prevailing party regarding the planning process issue. The District Court erred in denying the City's expert fees. Due to the important national concern, oral argument of 20 minutes is requested.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This case was brought in Federal District Court pursuant to the jurisdiction of 28 U.S.C. § 1331, 33 U.S.C. § 1365(a) and 42 U.S.C. § 6972(a)(1)(B) to redress alleged violations of the Federal Water Pollution Control Act ("Clean Water Act"), the City's National Pollutant Discharge Elimination System ("NPDES") Storm Water Permit, and the Resource Conservation and Recover Act ("RCRA"). On April 23, 2002, the District Court found that the City was technically in violation of its NPDES Permit regarding SSOs. In a subsequent Order dated December 13, 2002, the District Court awarded the Sierra Club attorneys' fees against the City. After a bench trial was held regarding the remaining comprehensive master planning process issue, Judgment was entered in the City's favor. The City requested its expert witness fees as the prevailing party regarding the planning process issue. On December 13, 2002, the District Court denied the City's request for expert witness fees. On January 13, 2003, the City filed its Notice of Appeal regarding both December 13, 2002 District Court Orders.

The appeal of these two decisions to the Eighth Circuit is based upon the jurisdiction conferred by 28 U.S.C. § 1291, allowing appeal from a final decision of a District Court.

STATEMENT OF THE ISSUES

I. Because the District Court found that the City was only technically responsible for the Little Rock Sanitary Sewer Committee's Clean Water Act violations, the District Court abused its discretion in awarding attorneys' fees to the Sierra Club against the City since the Sierra Club was not the prevailing party, or substantially prevailing party, as to the City on the basic question of liability.

Farrar v. Hobby, 506 U.S. 103 (1992).

Idaho Conservation League, Inc. v. Russell, 946 F2d 717 (9th Cir. 1991).

Rhodes v. Stewart, 488 U.S. 1 (1988).

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989).

II. On the issue of whether the City's Comprehensive Master Planning Process violated the Clean Water Act, the District Court erred in denying the City's requested expert witness fees since the District Court concluded that the City had always been in compliance with its NPDES Permit on this issue.

Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U. S. 412 (1978).

Morris-Smith v. Moulton Niguel Water District, 44 F. Supp.2d 1084 (C.D. Cal. 1999).

National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990, 48052-53 (1990) (to be codified at 40 C.F.R. § 122.26).

40 C.F.R. § 122.26(d)(2)(iv)(A)(2)(2003).

STATEMENT OF THE CASE

On December 31, 1996, NPDES Permit Number ARS000001 ("Storm Water Permit 01"), issued pursuant to the Clean Water Act, was provided two permittees: The City of Little Rock, Arkansas and the Arkansas State Highway & Transportation Department ("State Highway Department"), as co-permittees. [App. 392]. On July 1, 1996, NPDES permit number AR0021806 was issued to LRSSC regarding the Adams Field Wastewater Treatment Plant. On May 1, 1997, NPDES permit number AR0040177 was issued to LRSSC regarding the Fourche Creek Wastewater Treatment Plant.

Based upon allegations that the NPDES permits and the Clean Water Act had been violated, the Sierra Club filed suit against LRSSC and the City. Because the Sierra Club alleged violations for which the City and the State Highway Department were jointly responsible under Storm Water Permit 01, or for which the Highway Department was entirely responsible under the permit, the City filed a Third Party Complaint against the State Highway Department as a necessary and indispensable party, but the Sierra Club successfully resisted the Third Party Complaint. [App. 42-43]. The Sierra Club supported a successful motion to dismiss the State Highway Department since the State was only technically involved in Storm Water Permit 01 as a co-permittee. After hearing, the District Court dismissed the City's Third Party Complaint without prejudice as premature. [App. 43].

On January 13, 2000, the Sierra Club filed a citizen suit against the City for alleged violations of the Clean Water Act, 33 U. S. C. §§ 1251-1387, the City's NPDES Storm Water Permit and RCRA, 42 U.S.C. §§ 6901-6992k. The Sierra Club alleged that SSOs from the Little Rock Sanitary Sewer Collection System, operated and maintained by LRSSC, had entered the City's Municipal Separate Storm Sewer System ("MS4") in violation of the City's NPDES Storm Water Permit and the Clean Water Act. The Sierra Club also alleged the City had violated RCRA because of the SSOs occurring in the Little Rock Sanitary Sewer System. Regarding its claims against LRSSC, the Sierra Club alleged that the SSOs violated the Clean Water Act, LRSSC's two NPDES permits and RCRA. Under state statute, the LRSSC is completely responsible for the operation and maintenance of the sanitary sewer collection system. Ark. Code Ann. § 14-235-206 (Michie Repl. 1998); Little Rock, Ark., Ordinance No. 5,251 (June 10, 1935).

On March 5, 2001, the District Court granted the Sierra Club's summary judgment motion against LRSSC finding that LRSSC had violated the Clean Water Act by failing to prevent SSOs into the navigable waters of the United States. On September 12, 2001, the Sierra Club and LRSSC entered into a Settlement Agreement which served as the conduit for addressing the Sierra Club's issues regarding SSOs and RCRA. On November 16, 2001, Judgment on liability was entered against LRSSC for alleged violations of the Clean Water Act regarding SSOs. On February 14, 2002, the Sierra Club

filed its Application for an Award of Attorneys' Fees against LRSSC in the amount of $146,687.80.

On April 23, 2002, because the City had a separate NPDES storm water permit, the District Court found that the City was technically in violation of the portion of its NPDES Permit which related to SSOs into the MS4. The District Court declined to issue an injunction or civil penalties against the City and retained jurisdiction over the case to resolve any issues which may develop regarding remedies for permit violations. A bench trial was held on August 26, 2002 regarding the remaining comprehensive master planning process issue. On September 13, 2002, the District Court entered judgment in the City's favor on the planning process issue and directed the clerk to close the case. On September 24, 2002, the City requested an award for its expert witness fees in the amount of $13,719.61 as the prevailing party regarding the comprehensive master planning process issue.

The Sierra Club filed its Supplement to Fee Application on October 1, 2002 requesting attorney's fees in the total amount of $193,251.99 and alleged that LRSSC was liable for $92,635.81 and the City was liable for $100,616.18. On December 13, 2002, the District Court awarded attorneys' fees in the amount of $92,635.81 against LRSSC and $50,308.09 against the City. On December 13, 2002, the District Court denied the City's request for expert witness fees. On January 13, 2003, the City appealed the District Court's December 13, 2002 Orders. The Receipt and Satisfaction of Order

Dated December 13, 2002 Awarding the Sierra Club's Attorneys' Fees in the amount of $92,635.81 against LRSSC was filed on January 14, 2003.

STATEMENT OF THE FACTS

The City operates an MS4 in the City of Little Rock, Arkansas. [App. 392]. Pursuant to Environmental Protection Agency ("EPA") NPDES regulations at 40 C.F.R. § 122.26, the City is a "Phase I" municipality because it is a medium MS4 located in an incorporated place with a population of 100,000 or more, but less than 250,000. [App. 392].

In May of 1992, the City submitted its first NPDES permit application to the Arkansas Department of Pollution Control and Ecology, now the Arkansas Department of Environmental Quality ("ADEQ"). [Exh. 1]. On December 31, 1996, ADEQ issued Storm Water Permit 01 to the City and the State Highway Department, as co-permittees. [App. 392]. Storm Water Permit 01 authorized the City and the State Highway Department to discharge storm water runoff to the Arkansas River in segment 3C of the Arkansas River Basin. [App. 46; Exh. 31]. Storm Water Permit 01 became effective on January 1, 1997 and expired at midnight on December 31, 2001. [App. 393].

On April 1, 2002, the City submitted its application to ADEQ for another NPDES Permit. [App. 393]. ADEQ issued and published draft NPDES Permit No. ARS000002 ("draft Storm Water Permit 02") for public comment. [App. 393]. Draft Storm Water Permit 02 is a "Phase I" MS4 storm water permit identical to Storm Water

Permit 01, except (1) Part II.d.7, Duty to Reapply has been added; (2) schedule of compliance has been deleted; (3) new permit number ARS000002 has been assigned; and (4) the permit will expire one year from the effective date of the permit or the effective date of new MS4 permit. [App. 393]. Storm Water Permit 01 and draft Storm Water Permit 02 (sometimes collectively "Storm Water Permit") were issued pursuant to EPA "Phase I" regulations at 40 C.F.R. Part 122.26. [App. 393].

On May 10, 2002, the City, the State Highway Department and ADEQ entered into a Consent Administrative Order ("CAO") stipulating and agreeing that until such time as ADEQ issues a final permitting decision, the City and State Highway Department, in the operation of and discharge to the City's MS4, shall comply with all terms of draft Storm Water Permit 02. [App. 393]. The ADEQ CAO stated that the City had exhibited continued compliance with Storm Water Permit 01. [App. 393].

Part III, Section (B) of the Storm Water Permit requires that the City and the State Highway Department operate a Storm Water Quality Management Program ("SWQMP") in accordance with Section 402 (p) (3) (B) of the Clean Water Act, the Storm Water Regulations (40 C.F.R. Part 122.26) and the approved Storm Water Management Programs submitted by the City and State Highway Department. [App. 393-394; Exh. 51, 131].

The City and the State Highway Department have jointly developed, implemented and maintained a SWQMP. [App. 47]. The 1992 "Phase I" storm water permit application process culminated into ADEQ's issuance of Storm Water Permit 01 and the approval of the City's current SWQMP. [App. 394]. The City's current approved SWQMP is virtually identical to the draft storm water management program submitted with its permit application. [App. 394]. This SWQMP was approved by ADEQ and, according to the EPA and Part III (B) of the Storm Water Permit, is incorporated into the permit as actual permit requirements. [App. 394, Exh. 51, 131].

The ADEQ-approved SWQMP includes controls necessary to reduce the discharge of pollutants to the Maximum Extent Practicable ("MEP"). [App. 394]. Controls consist of a combination of Best Management Practices ("BMP"), control techniques, system design and engineering methods, and such other provisions as the City and State Highway Department or the State [ADEQ] determine appropriate. [App. 394].

Part III, Section (B)(6)(i) of the Storm Water Permit requires the City to effectively prohibit non-storm water discharges to the MS4. [App. 47; Exh. 53, 133]. Part III, Section (B)(6)(ii) of the Storm Water Permit requires that the City prohibit discharges from dry and wet weather overflows from sanitary sewers into the MS4. [App. 47; Exh. 53, 133].

The City has delegated, by vesting the appropriate authority, the operation of the Little Rock Sanitary Sewer Collection System to LRSSC. Ark. Code Ann. § 14-235-206

(Michie Repl. 1998); Little Rock, Ark., Ordinance No. 5,251 (June 10, 1935); [App. 48, 62]. The Little Rock Wastewater Utility ("LRWU") is the municipal utility acting under the legal authority of LRSSC. [App. 48]. The City utilizes LRSSC and LRWU as a BMP and control technique under the Storm Water Permit to effectively prohibit non-stormwater discharges such as SSOs into the MS4. [App. 48].

Because the LRSSC could not prevent each and every SSO in the sanitary sewer collection system from reaching the Arkansas River, a navigable water of the United States, a Clean Water Act violation occurred. [App. 40]. The Sierra Club and LRSSC entered into a Settlement Agreement to address SSOs. [App. 74-116]. Judgment on liability was entered against LRSSC for past alleged violations of the Clean Water Act for SSOs as alleged in the Sierra Club's First Cause of Action, referred to as Count One. [App. 72]. All other causes of action alleged by the Sierra Club against LRSSC, including alleged violations of RCRA, were dismissed with prejudice, subject to the provisions of the Settlement Agreement. [App. 72-73].

At oral argument on cross motions for summary judgment, the District Court found the City technically in violation of its NPDES Permit regarding SSOs entering the City's MS4. [App. 265, 314, 333]. In addressing the issue, the District Court stated:

> . . . [A] literal reading of these permits say you prohibit any sewage from getting into the storm system. I agree with you there. The problem I have is that it seems that there is almost an impossibility of performance of that duty that municipalities or their agencies have undertaken here. And maybe the enforcement agencies have recognized that to some extent and given the agency some time to either correct

> the situation or come back and apply for a different permit. I guess we have recurring overflows which seem to be primarily the responsibility of the Sewer Committee here under its permit. That is, they control the flow of the sewage and seem to be the best entity to prevent the overflows. All right? So if the City has undertaken an obligation to keep sewage out of its storm water system, how does it do that? How is it technologically or even feasible for the City to prevent what apparently is going to happen under some circumstances with some regularity? How are they going to keep sewage out of the storm system, even though they may have technically agreed to do that under this permit? [App. 306-307].

The District Court denied the Sierra Club's request for an injunction and civil penalties against the City because there was no evidence to indicate that the City would not cooperate with LRSSC in carrying out LRSSC's remedial plans under the Settlement Agreement regarding SSOs. [App. 314, 333-334]. The City has cooperated in the past with every reasonable request of LRSSC, and the City is aware of the Settlement Agreement. [App. 334]. The District Court retained jurisdiction over the case to resolve any issues which may develop regarding remedies for permit violations. [App. 265, 334].

Part III, Section (B)(2) of the Storm Water Permit requires the City to utilize a comprehensive master planning process to develop, implement, and enforce controls which will reduce, to the MEP, the discharge of pollutants from areas of new development and significant redevelopment after construction is completed. [App. 46, 394; Exh. 52, 131]. This section requires the City to "require permanent controls, as required by the Little Rock Code of Ordinances, to be implemented at newly developed areas to control the increased volume of water which will be discharged." [App. 46, 394; Exh. 52, 131]. The City proposed its comprehensive master planning process to ADEQ

as a part of the City's 1992 Storm Water Permit application process. [App. 212-219, 223, 228, 236, 239, 346-349, 351-352; Exh. 1, 5-7, 20].

The City's *Stormwater Management and Drainage Manual* is a part of the City's comprehensive master planning process for new development and significant redevelopment under the Storm Water Permit. [App. 49-50, 226-227, 396; Exh. 72]. The City's comprehensive master planning process for new development and significant redevelopment also includes, but is not necessarily limited to, certain items specified by the City Code. [App. 50, 396]. The following sections apply to various types of developments: (1) Persons planning to construct buildings or develop land must prepare and have approved a Stormwater Management and Drainage Plan as required by Articles III, IV, and V of Chapter 29 of the Code; (2) Persons planning to alter land are required to submit a Grading and Drainage Plan for review and obtain a grading permit as required by Article VI of Chapter 29; (3) Development must comply with certain zoning requirements of Chapter 36 of the Code; (4) Residential subdivisions must comply with the planning requirements of Chapter 31 of the Code; and (5) Most developments must apply for and obtain a building permit and demonstrate compliance with various City codes and standards regarding flood loss prevention as required by Chapter 8 of the Code. [App. 50-51, 396-397]. All City ordinances are subject to a public process involving public comment. [App. 51, 397].

The City's comprehensive master planning process also involves public planning such as the Task Force Review of Ordinances Regulating Land Use and Alteration, Landscaping, Zoning, Buffers, and Undisturbed Natural Areas ("Land Alteration Task Force"); the Mayor's Infrastructure Task Force; Future Little Rock; and Vision Little Rock. [App. 51, 52, 53, 225-226, 232-233, 397].

A bench trial was held regarding the remaining comprehensive master planning process issue. [App. 337, 392]. After trial, the District Court entered Judgment in the City's favor relative to the planning process issue. [App. 401]. The District Court concluded that the City had done exactly what it stated would be done in its storm water permit application and Storm Water Permit regarding the utilization of a comprehensive master planning process for new development and significant redevelopment. [App. 399]. The District Court directed the Clerk to close the case. [App. 400].

SUMMARY OF THE ARGUMENT

The District Court found that the City was technically in violation of its NPDES Permit regarding SSOs entering the City's MS4. [PP. 14, 20]. Despite the Sierra Club's requests for a remedy against the City, the District Court awarded no injunctive relief or civil penalties against the City. [P. 14]. The Sierra Club received no remedy from the City. [P. 18]. There is no judicially-ordered remedy against the City constituting a change in the legal relationship between the City and the Sierra Club regarding SSOs. [PP. 18-19]. There is also no evidence in the record that the City has materially altered its legal

relationship with the Sierra Club by modifying its behavior regarding SSOs as a result of this litigation. [P. 19]. The Sierra Club obtained all of its relief in this litigation regarding SSOs against LRSSC through the negotiation and entry of a judicially-enforceable Settlement Agreement for which the City was not a party. [P. 19]. Therefore, the Sierra Club is not a prevailing or substantially prevailing party as to the City. [PP. 19-20]. Consequently, the District Court abused its discretion in awarding attorneys' fees to the Sierra Club against the City because such award was not appropriate in this case. [P. 23].

Additionally, special circumstances make the District Court's attorney fee award unjust against the City. [PP. 23-24]. The Sierra Club has been fully compensated by LRSSC, the operator of the sanitary sewer collection system, the discharger of the SSOs, and the party from whom the remedy was received. [P. 23]. Any further award of attorneys' fees against the City is unjust. [PP. 23-24]. Thus, the District Court abused its discretion in awarding attorneys' fees against the City. [P. 24].

After a bench trial, the District Court entered Judgment in the City's favor and concluded that the City had done exactly what it stated would be done in its storm water permit application and Storm Water Permit regarding the utilization of a comprehensive master planning process for new development and significant redevelopment. [PP. 24-25, 27]. The District Court's Conclusions of Law set forth that the City had always been in compliance with its permit regarding the planning process issue. [PP. 25, 27, 33].

Therefore, the Sierra Club's claims concerning the planning process issue were without merit from the very beginning of the lawsuit. [PP. 25, 27, 33].

The Sierra Club's allegations regarding the planning process issue were unreasonable and without foundation because the Sierra Club relied on regulations which did not even apply to the City's permit, and the Sierra Club attempted to use a lawsuit against the City to force the City's Board of Directors to implement the Sierra Club's own agenda regarding its perception of "urban sprawl" in Little Rock. [PP. 29-30]. In furtherance of its stated agenda, the Sierra Club requested that the District Court order the City to perform extensive "New Development Impact Studies." [P. 31] The Sierra Club Plaintiff provided no legal basis for this requested relief. [P. 32].

Accordingly, the District Court erred in ruling that the Sierra Club's claims regarding the planning process issue were not unreasonable or without foundation and therefore abused its discretion in denying the City's requested expert witness fees. [PP. 27, 33].

ARGUMENT

I. Because the District Court found that the City was only technically responsible for the Little Rock Sanitary Sewer Committee's Clean Water Act violations, the District Court abused its discretion in awarding attorneys' fees to the Sierra Club against the City since the Sierra Club was not the prevailing party, or substantially prevailing party, as to the City on the basic question of liability.

Because the LRSSC could not prevent each and every SSO in the sanitary sewer collection system from reaching the Arkansas River, a navigable water of the United States, a Clean Water Act violation occurred. [App. 40]. Further, the City's Third Party Complaint was dismissed against the State Highway Department because the State was only technically involved in the Storm Water Permit as a co-permittee, and the District Court deemed the suit premature against the State Highway Department. [App. 42-43].

The District Court found that the City was technically in violation of its NPDES Permit regarding SSOs entering the City's MS4. [App. 265, 333]. In its Complaint, the Sierra Club requested at least eleven forms of relief against the City, which included requests for multiple types of injunctions and considerable civil penalties. [App. 33-35]. Despite the Sierra Club's requests for a remedy against the City, the District Court awarded no injunctive relief or civil penalties against the City. [App. 333-334, 401]. Through the Settlement Agreement, the Sierra Club obtained all of its relief against LRSSC, the legal entity charged by Arkansas statute and City ordinance[1] with the

[1] The authority for the operation of the Little Rock Sanitary Sewer Collection System is legally vested in LRSSC. Arkansas law provides that the construction, acquisition, improvement, equipment, custody, operation, and maintenance of any works for the collection, treatment, or disposal of sewage and the collection of revenue from it for the service rendered by it, shall be effected and supervised by a committee to be designated for that purpose of the municipal council. Ark. Code Ann. § 14-235-206 (Michie Repl. 1998). Pursuant to state law, the City created LRSSC to exercise the necessary statutory powers and duties to operate and maintain the sanitary sewer collection system.

responsibility of prohibiting and eliminating SSOs. Importantly, the District Court stated that there was no evidence in the record that an injunction was necessary to obtain any cooperation that LRSSC may need of the City relative to SSOs and therefore awarded no injunction, civil penalties or any other relief against the City. [App. 314, 333-334].

Moreover, the District Court did not order that the City change its conduct in any manner whatsoever regarding SSOs, or for that matter to do anything at all relative to the Sierra Club's allegations. There is absolutely nothing in the record which indicates that the City has altered its conduct in any way as a result of the District Court's finding of a technical violation as to the City. Consequently, the Sierra Club is not the prevailing party or substantially prevailing party as to the City on the basic question of liability and is therefore entitled to no attorneys' fees against the City.

The legal question of whether a litigant is a prevailing party is reviewed *de novo*. *Armstrong v. Asarco, Inc.*, 138 F.3d 382, 387 (8th Cir. 1998) (quoting *Jenkins by Jenkins v. State of Missouri*, 127 F.3d 709, 713 [8th Cir. 1997]). Section 1365(d) of the Clean Water Act leaves the award of litigation costs to the district court's sound discretion. *Armstrong*, 138 F.3d at 388 (citing *Jones v. City of St. Clair*, 804 F.2d 478, 481-82 [8th Cir. 1986]) ("The Clean Water Act leaves the awarding of costs and fees to the discretion of the court"). The Court of Appeals will not reverse an award of litigation costs under the Clean Water Act absent a finding of abuse of discretion. *Armstrong*, 138 F.3d at 382.

The Sierra Club is not the Prevailing Party or Substantially Prevailing Party as to the City

The Clean Water Act provides that the district court, "in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d)(2003); *Armstrong*, 138 F.3d 382, 386. Thus, a district court may award attorney's fees in a Clean Water Act case when (1) the applicant is a prevailing or substantially prevailing party; and (2) the court determines that the award is appropriate.

"[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992). Additionally, to recover a fee as a prevailing party under the Clean Water Act, the court must make a determination of whether the plaintiff has met his burden of establishing some causal connection between the litigation and the relief obtained. *See, PIRG v. Stone*, 156 F.R.D. 568 (D. New Jersey 1994).

The United States Supreme Court has considered whether a party who receives a technical finding of violation is a prevailing party for purposes of receiving an award of attorney's fees. In *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989), the Supreme Court stated that a purely technical or *de*

minimis victory may be so insignificant as to be insufficient to support prevailing party status. "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Garland*, 489 U.S. 782, 792-793.

Furthermore, the Supreme Court held in *Rhodes v. Stewart*, 488 U.S. 1 (1988) that entry of a declaratory judgment in a party's favor does not automatically render that party a prevailing party, and that the declaratory judgment will constitute relief only if it affects the behavior of the defendant. In *Rhodes*, the Supreme Court quoted its proposition in *Hewitt v. Helms* regarding the entry of a declaratory judgment and prevailing party status as follows:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces--the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement--what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion--is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*

Rhodes, 488 U.S. 1, 3 (quoting *Hewitt v. Helms*, 428 U.S. 755, 761 [1987]) (emphasis in original).

This Court has held, in *Hopkins v. Saunders*, 199 F.3d 968 (8th Cir. 1999), that the mere declaration of a procedural due process violation was not sufficient to confer prevailing party status on a plaintiff, thus precluding an award of attorney's fees. As in

Hopkins, the District Court's declaration of a technical violation of the City's Storm Water Permit is insufficient to support prevailing party status.

To merit prevailing party status, and therefore eligibility for an award of attorneys fees, the Sierra Club must have received relief from the City which materially alters the legal relationship between the parties by modifying the City's behavior in a way that directly benefits the Sierra Club. The District Court's declaration of a technical violation of the City's Storm Water Permit therefore constitutes relief to the Sierra Club only if such declaration materially alters the legal relationship between the City and the Sierra Club by modifying the City's behavior regarding SSOs that directly benefits the Sierra Club.

In this case, the Sierra Club received no relief from the City. Therefore, the Sierra Club is not a prevailing or substantially prevailing party as to the City and is not eligible for an award of attorneys' fees against the City. First, there is certainly no judicially-ordered remedy against the City constituting a change in the legal relationship between the City and the Sierra Club regarding SSOs. Second, there is no evidence in the record that the City has materially altered its legal relationship with the Sierra Club by modifying its behavior regarding SSOs as a result of this litigation. The Sierra Club obtained no commitments from the City to do anything. Moreover, the City certainly has cooperated in the past with requests made by LRSSC regarding the sanitary sewer system. [App. 311, 314, 334]. There is absolutely no evidence in the record that, as a

result of this litigation, the City has changed, or will change, its behavior regarding the Sierra Club's allegations against the City or the City's continued and ongoing support of LRSSC in addressing and correcting SSOs in the sanitary sewer collection system. Anything to the contrary is mere speculation.

Since the Sierra Club is not the prevailing party or substantially prevailing party as to the City regarding the basic question of liability, the District Court abused its discretion in awarding the Sierra Club attorneys' fees against the City.

The District Court's Award of Attorneys' Fees to the Sierra Club was not Appropriate

The Sierra Club obtained all of its relief in this litigation regarding SSOs against LRSSC through the negotiation and entry of a judicially-enforceable Settlement Agreement for which the City was not a party. [App. 72-116]. The Sierra Club obtained no such enforceable relief against the City in this case. Moreover, in this case, the Sierra Club has received full payment of attorney's fees in the amount of $92,635.81 from LRSSC. [App. 513].

In its Complaint, the Sierra Club sought at least eleven forms of relief against the City, including the assessment of massive civil penalties and no less than seven different forms of injunctive relief. [App. 33-35]. The Sierra Club obtained a *de minimis* declaration of a technical violation of the City's NPDES permit. [App. 265-266, 333-334]. Such insignificant, *de minimis* finding by the District Court, *without*

an enforceable remedy against the City, is not enough to establish the Sierra Club as the prevailing party or substantially prevailing party as to the City. It was therefore not appropriate for the District Court to award attorneys' fees against the City.

In *Farrar v. Hobby*, the United States Supreme Court held that the plaintiff, who obtained only a nominal damages award of one dollar on a claim for 17 million dollars in compensatory damages, was not entitled to any attorney fees, notwithstanding that he technically qualified as a "prevailing party." Justice O'Connor, in her concurring opinion, summarized the Court's holding by stating:

> When the plaintiff's success is purely technical or *de minimis, no fees can be awarded*. Such a plaintiff either has failed to achieve victory at all, or has obtained only a Pyrrhic victory for which the *reasonable fee is zero*.

Farrar, 506 U.S. 103, 117 (1992) (O'Connor, J., concurring)(emphasis added).

As in *Farrar*, the Sierra Club asked for a bundle and received a pittance from the City. The Sierra Club obtained no success relative to the City in this case. The Sierra Club may have won a technical "moral victory," but moral victories do not occasion the award of attorney's fees if the plaintiff obtains no enforceable remedy against a defendant. *See, Hopkins v. Saunders*, 199 F.3d 968, 978-79 (quoting *Hewitt v. Helms*, 482 U.S. 755, 762-63). Therefore, the reasonable fee to the Sierra Club from the City is zero.

In *Idaho Conservation League, Inc. v. Russell*, 946 F2d 717 (9th Cir. 1991), the Ninth Circuit held that environmental groups were not entitled to collect fees and costs

from the EPA because the organizations did not prevail against the EPA, but rather prevailed against the state of Idaho which, pursuant to a settlement agreement, agreed to, and in fact did, promulgate water quality standards. The Court stated the test as "(1) as a factual matter, the relief sought by the lawsuit was in fact obtained as a result of having brought the action . . . ." *Id.*, 946 F. 3d 717, 719 (quoting *Andrew v. Bowen*, 837 F.2d 875, 877 [9th Cir. 1988]). The Court stated that to determine whether the relief sought was obtained, courts look at "what the lawsuit originally sought to accomplish and what relief actually was obtained." *Id.*, 946 F. 2d at 719 (quoting *Andrew v. Bowen*, 837 F.2d 875, 877).

In this case, the District Court held that the Sierra Club was the prevailing or substantially prevailing party against the LRSSC. [App. 509]. Through the remedy of the Settlement Agreement, the Sierra Club accomplished its objectives in this litigation regarding SSOs and RCRA against LRSSC, the entity charged by statute and permit with the authority over the sanitary sewer collection system. As can clearly be seen from a review of the prayer in the Sierra Club's Complaint, the Sierra Club did not accomplish its objectives as to the City. In fact, the Sierra Club won nothing against the City.

The Sierra Club clearly did not prevail or substantially prevail against the City. Despite the Sierra Club's request for many different forms of injunctive relief and substantial civil penalties against the City, the District Court only declared a technical violation of the portion of the City's NPDES permit which relates to SSOs into the

municipal storm sewer system and ordered no remedy whatsoever against the City. [App. 33-35, 265-266, 314, 333-334]. Moreover, the Sierra Club requested that the court retain jurisdiction over the matter until such time as the City and the other stated defendants "have come into compliance with the Clean Water Act, the prohibitions, terms and conditions of their Clean Water Act NPDES permits, and the Resource Conservation and Recover Act." [App. 35]. Contrary to the Sierra Club's request, the court retained jurisdiction over the case to resolve any issues which may develop regarding remedies for permit violations. [App. 265-266, 333-334]. Then, at the conclusion of the case, the District Court directed the clerk to close the case. [App. 400].

Consequently, the district court abused its discretion in awarding attorneys' fees to the Sierra Club against the City because the award of attorneys' fees against the City was not appropriate.

The District Court's Attorney fee award Against the City is Unjust Due to Special Circumstances

The Sierra Club has received full payment of attorney's fees in the amount of $92,635.81 from LRSSC. [App. 513]. The Sierra Club has been fully compensated by LRSSC, the operator of the sanitary sewer collection system, the discharger of the SSOs, and the party from whom the remedy was received. Any further award of attorneys' fees against the City is unjust.

In *Rose v. Nebraska*, 748 F.2d 1258 (8th Cir. 1984), the plaintiff sued the state of Nebraska, the State Board of Education, the Commissioner of Education, the Governor of Nebraska, and the Douglas County School District #1 on behalf of his handicapped child under § 1983 and the All Handicapped Children Act. This Court held that special circumstances made a fee award unjust against either the Governor of Nebraska or the Douglas County School District #1. *Id.*, 748 F.2d at 1264. Furthermore, this Court stated that other parties were in the case with a much more direct connection to the issue on which the plaintiff prevailed, and that a fee award against these parties would fully compensate the plaintiff to the extent required by law. *Id.*

As in *Rose*, special circumstances in this case make the District Court's attorney fee award unjust against the City because: (1) LRSSC is charged by law and permit with the responsibility of operating, maintaining and rehabilitating the sanitary sewer collection system; (2) LRSSC discharged the SSOs from the sanitary sewer collection system; and (3) LRSSC, not the City, is directly responsible for prohibiting and eliminating SSOs, as evidenced by the terms and conditions of the Settlement Agreement. Again, the District Court abused its discretion in awarding attorneys' fees against the City.

II. On the issue of whether the City's Comprehensive Master Planning Process violated the Clean Water Act, the District Court erred in denying the City's requested expert witness fees since the District Court concluded that the City had always been in compliance with its NPDES Permit on this issue.

After a bench trial, the District Court entered Judgment in the City's favor and

concluded that the City had done exactly what it stated would be done in its storm water permit application and Storm Water Permit regarding the utilization of a comprehensive master planning process for new development and significant redevelopment. [App. 399]. The District Court further concluded that the City has utilized, and continues to utilize and expand upon, its master planning process which involves the public, to develop, implement, and enforce controls to reduce the discharge of pollutant from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. [App. 398, 401].

The District Court's Conclusions of Law set forth that the City had always been in compliance with its permit regarding the planning process issue. Therefore, the Sierra Club's claims concerning the planning process issue were without merit from the very beginning of the lawsuit. Although, the District Court, in its December 13, 2002 Order, ruled that the Sierra Club's claims regarding the planning process issue were not unreasonable or without foundation.

Section 1365(d) of the Clean Water Act leaves the awarding of costs and fees to the discretion of the court. *Jones v. City of St. Clair*, 804 F.2d 478, 481 (8th Cir. 1986). A district court's refusal to use its inherent power to impose fees is reviewed for an abuse of discretion. *Dubois v. U. S. Dept. of Agriculture*, 270 F.3d 77 (1st Cir. 2001) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 [1991]). However, a Court of Appeals reviews a district court's factual findings for clear error and its legal conclusions *de novo*.

Rahman X v. Morgan, 300 F.3d 970 (8th Cir. 2002) (citing *Speer v. City of Wynne*, 276 F.3d 980, 984-85 [8th Cir. 2002]).

The City is the Prevailing or Substantially Prevailing Party Regarding the Comprehensive Master Planning Process Issue and Therefore Qualifies for an Award of its Expert Witness Fees

The Clean Water Act authorizes the Court to award expert witness fees to any prevailing or substantially prevailing party. 33 U.S.C. § 1365(d)(2002).

The District Court held that the Sierra Club was not the prevailing party regarding the SWQMP issue. [App. 400]. The City is the prevailing party or substantially prevailing party regarding the comprehensive master planning process issue by virtue of entry of the Court's September 13, 2002 Judgment in the City's favor. *See, Morris-Smith v. Moulton-Niguel Water District*, 44 F. Supp.2d 1084 (C.D. Cal 1999); *National Wildlife Federation v. Consumers Power Co*., 729 F.Supp. 62 (W.D. Mich. 1989). Therefore, the City qualifies for an award of attorneys' fees under the Clean Water Act.

The Sierra Club's Allegations Regarding the Planning Process Issue Were Unreasonable and Without Foundation

". . . [A] prevailing defendant can recover attorney fees under the federal 'Clean Water Act,' 33 U.S.C. § 1365(d), if the Court finds the plaintiff's claims were frivolous, unreasonable, or without foundation." *Morris-Smith,* 44 F. Supp.2d 1084, 1085. *See also, National Wildlife Federation,* 729 F.Supp. at 65; *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978).

The District Court erred in its ruling on December 13, 2002 that the Sierra Club's claim regarding the comprehensive master planning process issue was not unreasonable or without foundation.

The City's expert, Dennis Ford, testified in deposition that the City utilizes, and continues to utilize and improve upon, a comprehensive master planning process, involving the public, for new development in compliance with the Storm Water Permit. [App. 209, 219, 221-222, 224-228]. Dr. Ford provided the same testimony at trial. [App. 347-348, 357-358, 365]. The City is a "Phase I" municipality under the EPA Storm Water Regulations. [App. 392]. In arriving at his expert opinion, Dr. Ford reviewed the EPA's "Phase I" Storm Water Regulations and the City's original "Phase I" storm water permit application. [App. 209, 211-219, 221-223, 240, 242, 346-349, 351, 353].

After hearing the City's expert testimony at trial, the District Court, in its Conclusions of Law, held that "[t]he City has done exactly what the City stated would be done in its storm water permit application regarding the utilization of a comprehensive master planning process for new development and significant redevelopment." [App. 399]. Since the District Court concluded that the City had always been in compliance with its permit regarding this issue, the Sierra Club's claims concerning the issue were clearly without merit when the Complaint was filed. Therefore, the District Court erred when it denied the City's expert witness fees and ruled in its December 13, 2002 Order that the Sierra Club's claims regarding the planning process issue were not without foundation.

The EPA "Phase I" Storm Water Regulations require that permit applicants submit a proposed storm water management program to control the discharge of pollutants in storm water. 40 C.F.R. § 122.26(d)(2)(iv); [App. 397]. Additionally, the EPA's "Phase I" regulations require that applicants submit proposed planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants in storm water from areas of new development and significant redevelopment. 40 C.F.R. § 122.26(d)(2)(iv)(A)(2). Finally, the EPA's "Phase I" Storm Water Regulations allow for flexibility in developing site-specific storm water management programs and permit conditions. 55 Fed. Reg. 47990, 48052-53 (1990); [App. 211, 240-241, 347, 383-384].

In 1992, the City submitted its application to ADEQ, which included the required planning procedures utilized by the City. [App. 212-213, 346-349; Exh. 1-30]. The City's SWQMP was accepted and approved by ADEQ and incorporated into the Storm Water Permit. [App. 223, 240, 351, 397; Exh. 51, 90]. The District Court concluded that the 1992 "Phase I" storm water permit application process resulted in issuance of Storm Water Permit 01 and the approval of the City's current SWQMP. [App. 394]. The District Court held that the City's current approved SWQMP was virtually identical to the draft storm water management program the City submitted with its permit application. [App. 394]. Furthermore, the District Court concluded that the EPA gave cities and permittees maximum flexibility in designing the BMPs which most effectively addressed

the problems anticipated in the SWQMP, that there was no one set of BMPs required for all cities, and that the cities were permitted to utilize the designs and techniques which are subjectively reasonable. [App. 398].

The Sierra Club's allegations against the City's the planning process were unreasonable and completely without merit since the Sierra Club's allegations relied upon an EPA "Phase II" Storm Water Regulation *which did not even apply to the City's "Phase I" Storm Water Permit.* [App. 57, 64, 239, 361; Exh. 288, 290]. Despite the mountain of evidence in this case to the contrary, and the fact that cities are given "maximum flexibility in designing the BMPs which most effectively address the problems anticipated in the SWQMP," the Sierra Club summarily declared that the City did not have a comprehensive master planning process, that the City had never engaged in the process to develop a plan, and proceeded to trial on the issue. Moreover, the Sierra Club did not provide any legal support for its claims, other than to cite regulations stating that the permittee is required to submit a planning process and to cite to *regulations not applying to the City's permit.* [App. 57, 64-65, 239, 361; Exh. 288].

The District Court stated that it wanted to hear the testimony of the expert witnesses in this case before ruling on the planning process issue. [App. 331]. However, well before the trial of this case, the City amply demonstrated that it had utilized a comprehensive master planning process to reduce the discharge of pollutants from areas of new development and significant redevelopment.

Additionally, the Sierra Club's allegations regarding the planning process issue were unreasonable and without foundation because the Sierra Club attempted to use a lawsuit against the City to force the City's Board of Directors to implement the Sierra Club's own agenda regarding its perception of "urban sprawl" in Little Rock. The Sierra Club ended up stating its true problem with the City's planning process, which was that the Sierra Club did not itself like what the City had been doing and wanted the City to do something else. The mere disapproval of a state law planning decision is not grounds for a federal environmental lawsuit and should not be rewarded by the avoidance of responsibility for expert fees and costs.

Very simply, the Sierra Club does not like or agree with the manner in which growth has occurred in the western portion of Little Rock over the last decade or more. The Sierra Club does not like what it perceives as "urban sprawl," the City's annexation policy decisions, or much of anything else to do with the expansion of west Little Rock. The Sierra Club's true agenda in this lawsuit rings loudly on their website:

> Since the national Sierra Club has ranked Little Rock the 5th most threatened in the small-city category in terms of lost green space, congested traffic, and unplanned, "big-box" type growth, and last in transportation planning, The Central Arkansas Group has campaigned for smart growth through inclusive planning with neighborhoods, maintenance of the infrastructure, and protection of the trees, terrain, and green space that are within its borders. The CAG sponsored a canoe trip along the Little Maumelle River to experience the cypress-laden waters west of L.R, bordering on land that could be home to a future wastewater treatment plant. The group supported [City Director] Paul Kelly's proposed moratorium on new wastewater treatment hookups until adequate study could be done as to the affect of unplanned growth and sprawl. The Sierra Club filed suit against the City

> of Little Rock, disturbed over unrestricted growth west of L.R while the sewer system, old and hard-pressed to handle excessive demands, blew manhole covers off their resting places on a regular basis during the rain, threatening the health and safety of neighborhoods by dumping raw sewage into the city ditches and flowing into the Arkansas River. The Sierra Club is confident of a positive outcome for the environment from its lawsuit. ….

http://arkansas.sierraclub.org/Activities.htm. [App. 57-58] (explanation added).

In furtherance of its stated agenda, the Sierra Club requested that District Court order the City to perform extensive "New Development Impact Studies" "to determine the areas of the natural environment within such areas of in interest that are of a unique character or value and which may include vegetation, wildlife habitats or water resources that may be adversely impacted by urban development." [App. 58, 66-67]. The Sierra Club provided no legal citation for this requested relief. [App. 67]. In fact, the Sierra Club Plaintiff pointed to absolutely no support, legal, administrative or otherwise, for its requested relief. [App. 58]. New development impact studies are not required by the EPA's "Phase I" Storm Water Regulations, the Storm Water Permit or the incorporated SWQMP. [App. 363-365, 398].

With absolutely no justification for the "New Development Impact Study" remedy requested by the Sierra Club, the Sierra Club wanted the District Court to order measures clearly not called for by the City's Storm Water Permit or any other source, wanted the District Court to grant it supervisory control over the City's MS4, and wanted to attempt to halt the growth of west Little Rock. [App. 58-59]. "New Development

Impact Studies" clearly had nothing to do with the City's Storm Water Permit and only served to further the Sierra Club's true agenda in this case.

Furthermore, at trial during the cross examination of the City's expert, the Sierra Club's attorney addressed the City implementing a "storm water utility," "basin studies," and the development of a so called "GreenPrint" for the City, and whether the City would be in compliance with its Storm Water Permit "as construed by Dr. Bell" (the Sierra Club's expert) if the City undertook such measures. [App. 380-382]. Again, while the City explored the implementation of such policy measures through the Mayor's Infrastructure Task Force and Vision Little Rock [Exh. 235-236, 246-248, 253-254], such measures are *clearly not required* to be implemented by the City's Storm Water Permit or the SWQMP. This is yet another example of the Sierra Club attempting to force the City's Board of Directors, through this lawsuit, to implement the Sierra Club's own agenda.

The Sierra Club's allegations regarding the planning process issue were unreasonable and without foundation when the Complaint was filed. As set forth in the District Court's conclusions, the City has always been in compliance with the planning process requirement. Consequently, the District Court erred in ruling that the Sierra Club's claims regarding the planning process issue were not unreasonable or without foundation and therefore abused its discretion in denying the City's requested expert witness fees.

The purpose for the award of attorney's fees and costs is to permit a citizen to challenge perceived environmental misconduct, and not be discouraged because of the potentially crushing costs of litigation. By the same token, a local government should not be forced to concede unreasonable litigation because of the costs incurred to prove that the government has complied with federal law. The Sierra Club should be required to pay the expert witness cost of the City since its lawsuit on the planning point was so fundamentally flawed and meritless. A brief review of litigation around the Country demonstrates that the Sierra Club is not like a poor individual plaintiff, but is in fact a well-financed litigation arm. *See, Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996); *Sierra Club v. Dombeck*, 161 F.Supp.2d 1052 (D. Ariz. 2001); *Sierra Club v. Environmental Protection Agency*, 769 F.2d 796 (D.C. Cir. 1985); *Sierra Club v. Marsh*, 639 F. Supp. 1216 (D. Me. 1986); *Sierra Club v. Mullen*, 619 F. Supp. 1244 (D. D.C. 1985); *Sierra Club v. Secretary of Army*, 820 F.2d 513 (1st Cir. 1987); *Sierra Club v. Union Oil Co. of California*, 853 F.2d 667 (9th Cir. 1988); *Sierra Club v. U.S. Army Corps of Engineers*, 771 F.2d 409 (8th Cir. 1985); *Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383 (2nd Cir. 1985); *Sierra Club v. U.S. Dept. of Energy*, 287 F.3d 1256 (10th Cir. 2002).

CONCLUSION

For the reasons stated herein, the City respectfully requests dismissal of the award of attorneys' fees against it. The City also requests the award of its expert witness fees

under the Clean Water Act as the prevailing party regarding the comprehensive master planning process issue.

Respectfully submitted,

Thomas M. Carpenter
City Attorney
By:

_____

Beth Blevins Carpenter, #91218
Deputy City Attorney
City Hall - Suite 310
500 West Markham
Little Rock, Arkansas 72201
(501) 371-4527

CERTIFICATE OF SERVICE

I hereby certify that one copy of a diskette containing the full text of this brief, two copies of the foregoing brief, one copy of the appendix, in two volumes, and one copy of the Exhibits have been served upon the below listed attorneys by hand-delivery on this ____ day of March, 2003:

Peter G. Kumpe
Sarah M. Priebe
Williams & Anderson LLP
111 Center Street
Twenty-Second Floor
Little Rock, Arkansas 72201

Joseph Henry Bates, III
McMath Woods, P.A.
711 West Third Street
Little Rock, Arkansas 72201

_____

Beth Blevins Carpenter

CERTIFICATE OF WORD PROCESSING PROGRAM
AND COMPUTER DISKETTE

I, Beth Blevins Carpenter, do hereby certify that the above and foregoing brief was prepared using Word 2000, and that it complies with the type-volume limitation under FRAP 32(a)(7)(C) and (D). According to the word count in the program, this brief contains 11,480 words. I also certify that one 3.5 inch diskette containing the full text of the brief is included, and that the diskette provided to the Clerk has been scanned for viruses and is virus-free.

_____
Beth Blevins Carpenter

ADDENDUM

Table of Contents

Required Items:

Discretionary Items: